NO. 1496

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE GREAT FALLS NATIONAL BANK (a Corporation),

Appellant,

vs.

CHARLES D. McLURE, THE DIAMOND R. MINING COMPANY (a Corporation), and A. W. MERRIFIELD, United States Marshal for the District of Montana.

Appellees.

APPELLEE'S BRIEF.

IRA T. WIGHT,

Solicitor and Counsel for Appellees.

Naegele Printing Co., Helena, Mont.

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APPELLEE'S BRIEF.

May it please the Court:

This is a suit in which complainant below (appellant here) seeks to enjoin the collection of a judgment at law; or, at all events, secure some sort of a decree whereby the junior judgment of appellant may take precedence over Appellee Charles D. McLure's senior judgment in the order of satisfaction out of the assets

of the common debtor, the Diamond R. Mining Company.

The complaint contains no positive averment of any special ground upon which this extraordinary jurisdiction of the Equity Court is invoked, but the recitals are freely emphasized with the adverbs "fraudulently," "collusively," and the like, so that it would appear that the jurisdiction is based upon alleged "fraud."

In any proceeding of this character, where the solemn judgment of a Court of law is attacked, it is elementary that every presumption is in favor of the regularity and validity of the judgment.

Judgments of the Courts are not trivial matters, to be flitted about at will, but are the quality and stability of our entire legal jurisprudence. Adjudications of the Courts therefore, evidenced by final judgments, will not be disturbed unless a most deplorable state of affairs be disclosed, and even then, Equity will refuse to interfere where the bill fails to disclose either or any of the equitable requisites hereinafter specified.

> "On a Bill in Equity against a judgment at law, presumptions will be indulged in favor of the jurisdiction of the Court; the regularity of its proceedings and the validity of the judgment."
>
> 23 CYC. 1047.

The bill does not contain an allegation or a suggestion that appellant did not have full and complete knowledge of all the facts alleged therein, ever since

the commencement of the original action on December 14, 1901, over five years ago; the bill contains no excuse of any kind for the delay of five years in presenting these alleged fraudulent transactions to the Court; the complaint contains no suggestion of any good or meritorious defense to the cause of action upon which the judgment now sought to be set aside, was rendered. The complaint alleges the consideration failed because Charles D. McLure promised to consolidate with the Diamond R. Mines, the Broadwater Group and failed to do so. What sort of arrangement this was to be, or whether such an agreement was in writing as required by the laws of this state, the bill fails to disclose. We have the pleader's conclusion that there was a failure of consideration, whereas the bill on its face shows: "that the said Charles D. McLure was the only other large creditor of the defendant company" (Trans. p. 11) and again: "proceeded to enlarge said concentrator so as to make the same have a capacity of three hundred tons of ore daily, and which was done at an additional cost and expense of about one hundred thousand ($100,-000.00) dollars (most of which was advanced by said Charles D. McLure, one of the defendants herein, and embraces the moneys sued for in the aforementioned action)." (Trans. p. 12). The bill does not contain a suggestion that every cent covered by the judgment was not for money actually loaned to the defendant company.

Paragraph six (6) of the bill (Trans. p. 9) alleges a promise on the part of Appellee McLure to stand surety for the Company in the payment of Appellant's claim. This, however, is no ground for setting aside a judgment at law. If the appellent has any such agreement, then it has a plain, speedy and adequate remedy at law against said appellee as surety upon said debt, and the very fact any such agreement existed would preclude there being any jurisdiction in Equity of this suit. No allegation of any insolvency is contained in the bill, and we contend that by this allegation alone, appellant has pleaded itself out of court.

BRIEF AND ARGUMENT.

I.

JURISDICTION.

This is not a suit in equity ancillary, or brought in aid of any action at law in the Federal Court. The complaint on its face shows this to be an original suit in equity, brought for the purpose of setting aside a judgment at law, previously rendered in the Federal Court, in an action in which the complainant below (appellant here) was not a party.

No suggestion of a federal question can be found in the complaint.

The complaint affirmatively shows the lack of diversity of citizenship.

The complaint contains no jurisdictional clause, nor any allegation showing how the federal court secures jurisdiction of this suit.

There is no direct allegation in the complaint that the amount in controversy exceeds the sum of $2,000.

II.

APPELLEE CHARLES D. McLURE'S LIEN.

Counsel for appellant cites numerous authorities holding that a director of a corporation cannot exercise his office to the giving preference of his own claim over the claims of others against the corporation.

Vol. 5, Thompson on Corporations, Secs. 6492, 6503, 6504 and 6508 all deal with the power of directors of a corporation to "prefer themselves as creditors in respect of debts previously contracted over other general creditors."

Vol. 5, Thompson on Corporations, Sec 6506, announces the doctrine that such directors cannot prefer their relatives.

The cases cited by appellant are to the same effect. All of these are entirely inapplicable here, for the following reasons:

1st: Appellee Charles D. McLure, was not a director or officer of the corporation.

2nd: The directors never made any preference in favor of anybody.

3rd: The complaint shows that Appellee McLure secured his lien by due process of law.

4th: No fraudulent act is charged in said complaint. (See Subdivision V. of this brief, hereinafter contained.)

5th: A judgment at law will not be set aside by a court of equity to allow such a claim to be interposed long after the judgment has become final. (See Sub. VI of this brief, hereinafter contained.)

6th: The complaint contains no sufficient excuse for appellant's failure to litigate such claim, prior to the rendition of judgment in the original action at law.

7th: Appellant is barred by its laches in allowing five years to pass before setting up such claim. (See Sub. VI of this brief, hereinafter contained.)

III.

THERE IS NO SUFFICIENT ALLEGATION THAT THE LIEN OF APPELLEE CHARLES D. McLURE WAS MADE TO HINDER, DELAY OR DEFRAUD.

The complaint alleges that the lien of said appellee was not made in good faith, but was made for the purpose of hindering, delaying and defrauding the appellant.

Fraud cannot be alleged in any such manner as

this. (See Sub. V. of this brief hereinafter contained.) The complaint contains no statement of facts whatever disclosing to the court wherein or how said appellee's lien was for the purpose of hindering, delaying or defrauding appellant. An attachment is always for the purpose of securing a lien upon the property attached, and to hold the same for the payment of a certain indebtedness. The complaint does not even allege that the attachment was not put upon the property to secure the payment of a good, valid existing claim. Courts of equity do not set aside the due process of courts of law, upon the mere statement of a legal conclusion in a complaint.

This point is also subject to the same objections enumerated above in Sub. II hereof.

IV.

ALLEGED DELAY IN ISSUANCE OF EXECUTION.

Counsel for appellant cites several cases upon the question of reasonable time for the issuance and levy of an execution under a judgment at law. The judgment attacked in this suit was a judgment at law, rendered by the federal court. No citation of authority is necessary upon the proposition that in a law case the federal court in Montana follows the Montana Statutes.

Appellant's authorities upon the general rule, are

inapplicable in Montana, for the time for issuance and levy of execution in this state is fixed by statute.

Sec. 1210 of the Code of Civil Procedure "The party in whose favor judgment is given may, at any time within six years, after the entry thereof, have a writ of execution issued for its enforcement."

This provision of the Code would be of little benefit to a party if before the time which the statute allows had expired a third party can base his right to set aside the judgment upon the ground that the plaintiff therein took the time which the law allows to issue his execution, and for that reason the rights which have been decreed him may be taken away.

If appellant desired to contest the priority of the claims it has shown no reason why it did not intervene in the original case at the proper time, and have that question determined. On the contrary, however, it took no steps to intervene but proceeded with its action in the State Court and took out a judgment in the State Court. Its action was commenced in the State Court just three days after the action was instituted in the United States Court, and something like a month before the judgment in the United States Court was rendered. (See Trans. pp. 5-7.)

Now we ask in all fairness, can a party who has full knowledge of the facts and an opportunity to come in and be heard, and who fails to do so, wait until five years after final judgment and then come in to a court

of Equity and ask to have his claim decreed prior to the claim of the plaintiff in that action? The appellant in this case had ample opportunity to elect which course it should pursue; whether to come into the case pending in the Federal Court and litigate the priority of its claim over the claim of the plaintiff therein, or to go ahead with its case in the State Court, and it did elect to proceed with its case in the District Court. Now, when it finds that the judgment of the United States Court and the attachment of the United States Court is prior to the liens which it secured in the State Court it asks this Court for leave to come in at this late day.

How is appellant injured by said appellee's delay in issuing execution? If it was in fact injured by reason of said appellee's exercising a legal right, granted to him by the laws of Montana, it certainly cannot base any action upon appellee's exercising a legal right. But, wherein does an injury lie? It alleges the delay has been collusive and for the purpose of cheating and defrauding the appellant, but neither in the bill nor in its brief does it make it clear how this could be. The theory of injury by reason of appellee's delaying the issuance of execution must be, that if appellee had proceeded to sell the property, the appellant would then have had the statutory time within which to redeem the same, by paying the amount of appellee's judgment. If this is the foundation of the injury claimed by appellant, such a claim is, in view of the

statutory provisions in this State, certainly absurd. The Bill alleges that appellee has been holding this property, and that it has been depreciating in value. The matter of fact is, the appellant has been in a position to redeem the property from appellee's judgment at any time since that judgment was rendered. The only effect of appellee's not levying execution immediately has been to give appellant five years within which to redeem instead of one. It has never been tied down a moment. It can redeem today if it so desires. Section 3781 of our Code of Civil Procedure protects a subsequent lienor from any damage by his prior lienor. If he feels that the property is depreciating or that it is necessary to make a sale at once in order to protect his second lien, the prior lienor cannot stop him. All he need to do is to redeem the prior lien, and the law subrogates him to all the benefits of the superior lien.

> "Sec. 3781: One who has a lien, inferior to another, upon the same property, has a right:
>
> 1. To redeem the property in the same manner as its owner might from the superior lien; and,
>
> 2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby."

The fact is the appellant does not want to redeem, and never did and never will. The sum and substance

of its effort is to secure priority over appellee's judgment, and as a cover for its five years laches in seeking so to do it tries to set up that in some unaccountable way it is injured because appellee has taken the time allowed him by law to issue his execution. If we are to understand appellant has been pining for an opportunity to redeem, we would suggest that inasmuch as its bill is of an equitable character, that it would have been proper for it to have made a tender of the amount of our judgment.

If for any reason the plaintiff in the original case felt that it was not to his advantage to issue execution and make a sale of that property during a period when he felt that conditions were not favorable to a sale, we certainly feel that he was entitled to take the time the laws of the State give him within which to satisfy his judgment. When the Court considers this period of delay we cannot but believe that the Court will see far more to criticise in the delay on the part of appellant itself than in the delay on the part of plaintiff in the original suit.

If the appellant claims priority it is certainly a strange time for it to come in with its allegations of fraud, collusion and conspiracy for the purpose of establishing its priority. On the appellee's part the delay in issuing execution is in conformity to a legal right which the statutes of this State give him, and on the appellant's part the delay in filing this bill is in con-

formity to no provision of law that we can find.

It may be granted that in the absence of express statutory regulation, the general rule is that it is the duty of a judgment creditor to use reasonable dispatch in levying upon personal property attached; but where the statute fixes a period during which at any time execution may issue, the law has thus fixed the limits of what is reasonable time, and the courts will not curtail it.

As Chief Justice Marshall said in Rankin et al vs. Scott, 12 Wheat. 179, the circumstances of not proceeding upon the elder judgment, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien.

In Mosely vs. Edwards, 2 Florida 429, there is an elaborate and learned discussion of the effect of delay in suing out execution upon the lien of a judgment, the court holding that such lien is not lost by mere delay, and approving the doctrine laid down by Chief Justice Marshall in Rakin et al vs. Scott, supra.

In Speelman vs. Chafee, 5 Colorado 247, the court held that when in a suit in attachment, the plaintiff obtains a judgment, which, by existing law, is a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is maintained and enforced under the judgment by virtue of the execution issued thereon. In discussing

what was a reasonable time within which the judgment creditor should levy his writ of execution, the court said that they had found no decision fixing a period outside of statutory rule.

In the later case of Floyd vs. Sellers (Colorado) 44 Pacific 373, it was expressly held that there is no reason why a greater degree of diligence should be exacted from a judgment creditor, whose only lien is that of his attachment, than is required by the statute in the enforcement of the lien of a judgment. The Court said: "In the latter case six years are allowed, and we can perceive no distinction between the two classes of liens, which would make a shorter time negligence where the lien is that of an attachment and not of a judgment." The Colorado statute originally required that execution should be issued within one year, but after the decision in Speelman vs. Chafee, supra, the law of the state was changed and the lien of a judgment was made to continue for six years, whether an execution be issued or not; and the court affirmed the view that the statute is a proper guide in determining the question of diligence upon the part of an attaching creditor in enforcing after judgment the lien of his attachment.

See also, Lant vs. Mauley, 75 Fed. 627.

Second Freeman on Judgments, Sec. 377, 391-A, 339;

Watkins vs. Wassele, 15 Arkansas 73;

Devendall vs. Doe, 27 Alabama 156;

23 Cyc., P. 1399.

V.

NO PROPER ALLEGATION OF FRAUD.

The bill of complaint in this case utterly fails to make any allegations of fraud which would justify a Court of equity in setting aside a judgment at law. The complaint charges that process was served upon the brother of this defendant, but the complaint also shows that such brother was the proper person upon whom service should be made. The complaint alleges that said brother allowed this defendant to take judgment by default. Despite complainant's repeated use of the words "collusively" and "fraudulently," there is in fact no fraud to be presumed because no defense was interposed, where the bill fails to disclose that any defense to the claim existed; nay, even further, where the bill affirmatively does disclose that the action was based upon notes, for which a full and valuable consideration in current coin of the realm had been paid.

> Dinger v. Receiver of Erie Ry. (N. J.) 8 Atl., 811: "There can be no doubt that the first ground stated in the bill imputes to the defendant in this action a fraud of the most iniquitous character.

He is charged with both corruption and forgery. The allegation of the bill is that the defendant, by corrupt means, procured an employe of the complainant to alter a book, after it had been put in evidence, so as to make it furnish forged evidence of fraud. Now, while I think it would be difficult to imagine anything more detestable in the way of fradulent conduct, or more dangerous to the safe administration of justice, than the fraud here charged, still I also think it must be admitted that this Court is powerless to do anything by way of correction, punishment, or redress of such fraud in this case, unless it is clearly shown that the decree assailed is the product of such fraud, and has no other foundation. A court of equity may unquestionably annul a judgment or decree which has been obtained by fraud; but, in order to justify such an exercise of power, it must be made clearly to appear that the judgment or decree has no other foundation than fraud. In other words, it must be made to appear that, if there had been no fraud, there would have been no judgment or decree. An attempt to exercise a wider or more liberal jurisdiction in cases of this class would, it will be perceived, necessarily enlarge the jurisdiction of Courts of Equity so as to make them practically courts for the review of the judicial acts of other tribunals, and not tribunals with just sufficient power to redress frauds by undoing what fraud has done.

Mr. Wills, in his treatise on Res Adjudicata, (page 499) states the rule on this subject as follows: "Fraud vitiates everything, and a judgment equally with a contract,—that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in

general, equity will not go again into the merits of action, even for the purpose of detecting and annuling fraud."

Is there anything contained in the bill under consideration whereby it is "made to appear that, if there had been no fraud there would have been no judgment or decree?" Careful scrutiny has failed to reveal any such allegation to us.

Ross vs. Wood, 70 N. Y. 9.

Heller vs. Dyerville Mnfg. Co. (Cal.) 47 Pac. 1016: "There is therefore nothing in the facts alleged to sustain the general averments of a fraudulent purpose in the manner of procuring the decree; and such general averments, standing alone, and unaccompanied by facts which in themselves disclose fraud, are insufficient to give the transaction even a colorable aspect of that nature. Such general averments are to be regarded as merely the conclusions of the pleader, embracing no issuable character, and not the averment of substantive facts, which are admitted by the demurrer. As said by the Supreme Court of the United States in passing upon the sufficiency of a Bill of similar construction: 'It is full of the words 'Fraudulent' and 'corrupt' and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisprudence, unless the transactions to which they refer are such as, in their essential nature, constitute a fraud or a breach of trust for which a Court of Chancery can give relief.'"

Ohio & W, M. & F. Co., vs. Carter (Kansas) 58 Pac. 1040: "The petition complained of set forth. Held, that the demurrer thereto should have been sustained.

"When fraud practiced by the successful party is alleged the facts showing such fraud must be stated or set forth in a plain and concise manner, as in other cases. Mere knowledge of certain facts is not sufficient. The fraudulent acts and proceedings of such parties designed and practiced for the purpose of securing an unfair and unjust judgment, must be clearly shown."

United States vs. Throckmorton, 98 U. S. 61; 25 L. Ed. 93: "Fraud vitiates everything, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the Court will not go again into the merits of an action for the purpose of detecting and annulling the Fraud. * * * * Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone, and has no weight as a precedent."

United States vs. Atherson, 102 U. S. 372; 26 L. Ed. 213: "A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it and the manner in which

the Court or the party injured was misled or imposed upon."

"A court of equity upon a proper application will relieve against or enjoin a party from enforcing a judgment which he has obtained by means of fraud. The term "fraud" as here used is to be taken in its common and direct sense and means the perpetration of an intentional wrong, or the breach of a duty growing out of a fiduciary relation. To obtain relief on this ground it is necessary that the fraud charged schould be clearly stated and proved, and it must appear that the fraud was practiced or participated in by the judgment creditor, that it was actually effective in bringing about the judgment which was rendered; that the complainant in equity has a good defense to the action on the merits and has no other adequate means of obtaining relief against the judgment or avoiding its consequences, and that his situation is in no way due to his own negligence or lack of proper diligence."

23 Cyc. 1022.

VI.

LACHES.

"The complainant in a suit in equity for relief against a judgment at law must exonerate himself; that is, his bill must contain proper averments to show that the judgment against him was not attributable to his own negligence or fault, and that he has been diligent in seeking to make his defense, and he must set forth the facts which he relies on as showing such diligence."

23 Cyc. 1042.

"But the mere loss of a legal remedy is no ground for equity to interfere unless it is also shown that there is equitable grounds of objection to the judgment as it stands; and relief will in no case be granted where the loss of the remedy at law was due to the party's own negligence or fault or that of his counsel."

23 Cyc. 985.

Rio Grande etc., vs. Gildersleeve, 174 U. S. 603: "We are also of opinion that the general current of authority in the Courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised we have shown that a court of equity, on the most formal proceedings, taken in due time, could not, according to its established principles, have granted the relief which was prayed for in this case. It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief."

"One who desires to invoke the assistance of equity as against a judgment at law must act with reasonable promptness and relief will not be granted to a complainant who has delayed his application to equity, without adequate excuse, for such a considerable period of time as to be chargeable with laches."

23 Cyc. 1046.

Adams School Tp. vs. Irwin, (Ind.) 49 N. E. 806: "Equity, however will not interpose to relieve a complaining party from a judgment at law on the grounds that he had a valid defense to the action wherein the judgment was rendered, which was not interposed by reason of his own negligence. As a general rule, every person is required to look after his own rights, and to see that they are vindicated in due season and in proper manner. Consequently where a defendant has a proper means of a defense in his power, but neglects or fails to employ such means in a proper tribunal, and suffers a judgment to be recovered against him in a proper tribunal, he is forever precluded. Center Tp. vs. Board of Com'rs of Marion Co., 110 Ind., 579, 10 N. E. 291, and authorities there cited. The fraud that will annul or vacate a judgment is not that arising out of the facts which were actually or necessarily in issue in the cause in which it was rendered. The rule is that the fraud which vitiates a judgment must arise out of the acts of the prevailing party, by which his adversary has been prevented from presenting the merits of his side of the case, or by which the jurisdiction of the court has been imposed upon; or, in other words, the fraud relied on must relate to some act in securing jurisdiction, or as to something done concerning the trial or the judicial proceedings themselves; and the rule has no application to cases of fraud in the transaction, or matters connected with it, out of which the legal controversy arose."

The appellant in the case at bar, had ample opportunity to come in and contest the priorities of claims before the judgment in the original action was

rendered. The bill itself shows that appellant had knowledge of the action not later than Dec. 18th, 1901, when the attachment was levied, and the sheriff of Cascade County was prevented from taking possession under appellant's attachment issued by the State Court. (Trans. p. 8). The judgment was not rendered until the 16th day of January, following. (Trans. p. 6). If appellant claimed any interest in the subject matter of this action, it had a plain, speedy and adequate remedy at law. The original case being an action at law, the Codes of Montana governed the procedure therein.

Sec. 589 of the Code of Civil Procedure provides: "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both."

Appellant therefore had full knowledge, and ample opportunity to contest the priority of appellee's claim, and the validity of the attachment, in the action at law, but instead of doing so, appellant has allowed its opportunity to pass, and now, after sleeping for over five years upon its alleged rights, it seeks to invoke the aid of equity to set this judgment aside.

Miller vs. Miller's Estate, (Neb.) 95 N. W. 1010;

Perkins vs. St. Louis K. & C. Ry., (Mo.) 45 S. W. 260;

Rowlett vs. Williamson, (Tex.) 44 S. W. 624.

Vantilburg vs. Black, 3 Mont. 459: "But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceedings at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief. These views are sustained by many authorities."

Alexander vs. San A. L. Co., (Tex.) 13 S. W. 1025;

Donaldson vs. Roberts, (Ga.) 35 S. E. 277;

Berry vs. Burghard, (Ga.) 36 S. E. 459;

Johnson vs. A. G. & T. Co., 156 U. S. 618; 39 L. Ed. 556;

Abraham vs. Ordway, 158 U. S. 416; 39 L. Ed. 1036: "One of the grounds upon which courts of equity refuse relief where the plaintiff is guilty of laches is the injustice of imposing upon the defendant the necessity of making proof of transactions long past, in order to protect himself in the enjoyment of rights which, during a considerable period, have passed unchallenged by his adversary, with full knowledge of all the circumstances."

This court in Denton vs. Baker, 93 Fed. 46 uses the following language:

"If we were free to decide this cause upon the merits, we would not have the slightest difficulty in holding the claim upon which the judgment here sought to be annulled was entered, as well as the judgment itself, fraudulent and void, as against

the stockholders and creditors of the insolvent bank, and in affirming the decree appealed from. But, unfortunately, through the neglect of the receiver, the rights and interest of those parties appear to be charged with this claim and judgment, without any apparent hope of relief. Certainly, there can be none in the present suit, and for these reasons: Baker became receiver on the 19th day of June, 1895. The Judgment in the action of Denton against the bank was rendered on the 30th day of November, 1895, notice of which judgment the receiver, in his testimony, admits to have received a few days after its rendition. To get rid of that judgment the receiver had the opportunity and the means, by proceedings in the court in which the judgment was rendered. * * * * * * * * * * * "The power of a Court of equity to relieve against a judgment," said the Supreme Court in Brown vs. Buena Vista Co., 95 U. S. 157, 159, "upon the ground of fraud, in a proceeding had directly for that purpose, is well settled; and the power extends, also to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief." To the same effect are many decided cases and text writers. We cite a few of them: Knox Co. vs. Harshman, 133 U. S. 152, 10 Sup. Ct. 257; Nongue vs. Clapp, 101 U. S. 551; Graham vs. Railroad Co., 118 U. S. 161, 6 Sup. Ct. 1009; Furnald vs. Glenn, 56 Fed. 373; Association vs. Loch-

miller, 20 C. C. A. 274, 74 Fed. 23; Ere vs. Hazen, 61 Cal. 360; 1 Black Judgm. (1st. Ed.) 361; Freeman Judgm. Secs. 486, 489, 490, 495; Storry Eq. Jur. Secs. 894, 896.

"Although not made a party to the action brought by Denton in the state court, the right of the receiver, based upon a seasonable application, to appear in that court and contest the validity of the judgment, does not admit of doubt. Bank vs. Colby, 21 Wall. 609; Denton vs. Baker, 24 C. C. A. 476, 79 Fed. 189, 192; Denton vs. Bank (Wash.) 51 Pac. 473. The receiver, therefore, had ample opportunity to take appropriate proceedings in the very action in which the judgment was rendered, to contest its validity on any ground of fraud or irregularity that existed. Instead of resorting to that forum, and while the right to do so still existed, he brought the present suit in the Court below. That a court of equity will not interfere, under such circumstances is thoroughly settled, as will be seen by a reference to the authorities already cited.

Not only did the receiver allow the period prescribed by sections 1393 and 1395 of the Washington Statutes (2 Hill's Ann. Code) to pass without making any motion for the annullment of the judgment, but he made no appearance in that court at all until March 10, 1897, nearly two years after the rendition of the judgment against the bank, at which time he applied to the superior court which gave the judgment, to vacate and set it aside, and to permit him to file an answer and defend as such receiver."

The court will observe that the foregoing case is almost identical with the case at bar. In that case as in

the case at bar, the complainant was not a party to the original action, but there as in this case, had knowledge of the action, and an undoubted right to come into the case if it had seen fit to do so. Having had the knowledge and the opportunity, the Court holds that Equity will not disturb the judgment of the law court, even though the court in the Denton case states that the judgment was undoubtedly obtained fraudulently.

The same matter was also presented to the Supreme Court of Washington (See 51 Pac. 473) and that court said:

> "We do not discover any excusable neglect in the receiver in making this application. On the contrary, a fair inference from all his acts in realtion to the judgment entered is that he had deliberately determined not to make such an application or to appear in the Superior Court, and afterwards changed his intention when the motion to vacate was made. We think from the record presented here, that the order of the Superior Court denying the application to vacate the judgment was correct and it is affirmed."

And so in the case at bar, the appellant in like manner, with full knowledge of all the facts, and with an undoubted right to come in and litigate appellee's claim, deliberately stood by and allowed judgment to be entered, and then took no action whatever for five years thereafter. And even further than this, proceeded with its own claim in another tribunal. (Trans. p. 7.)

Mass. B. L. Assn. vs. Lohmiller, 74 Fed. 23;

"Whenever a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. * * * * * The bill is silent in another respect, of which these principles of equity generally require clear expression before relief can be extended. There is no impeachment of the cause of action upon which the judgment was rendered, nor suggestion of defense in whole or in part."

Pacific R. R. Co. vs. Missouri P. R. R., 12 Fed. 641: "Among these rules are the following: (1) No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit * * * (2) Nor will relief be granted if the complaint might, by the use of due diligence, have ascertained the facts and pleaded them in the original suit."

Roots vs. Cohen (Miss) 12 So. 593;

German Sav. Bnk vs. Des Moines N. B. (Iowa) 98 N. W. 606;

City of Ft. Pierre vs. Hall (S. D.) 104 N. W. 470.

Gray vs. Barton (Mich) 28 N. W. 813:

"Equity relieves against a common-law judgment only upon clear proof of artifice and deceit by the prevailing party against his adversary, and

the injured party must have been diligent in the assertion of his rights."

Proctor vs. Pettit (Neb) 41 N. W. 131:

"It is an elementary principle that courts of equity will not take jurisdiction of causes where the complainant has a complete remedy at law, even though the party complaining may not have availed himself of the remedy, and by laches deprived himself of it."

Long vs. Eisenbeis (Wash) 51 Pac. 1061:

"More than a year elapsed before plaintiffs took any action with reference to the judgment sought to be vacated. * * * No reason is alleged by plaintiffs why application to vacate the judgment in the original action was not seasonably made. It will be found upon an examination of the authorities, that, where such applications to vacate a judgment have been entertained, it has been in those cases where the complainants were without fault or negligence."

Ratliff vs. Stretch (Ind) 30 N. E. 30:

"Equity will not enjoin the enforcement of a decree obtained by fraud, mistake or accident, unless the complainant shows that the same could not have been prevented by the use of reasonable diligence on his part, that the law afforded him no efficient defence against such decree, and that he has been diligent in seeking relief."

Barnett vs. Barnett (Va) 2 S. E. 733:

"Where a bill to enjoin relief against a judgment on a bond, which it was alleged was procured by fraud, was not filed until six years after the perpetration of the fraud, relief was refused on

the ground of unreasonable delay."

Hildreth vs. James (Cal) 41 Pac. 1039:

"The present action was not brought until more than five years after the entry of the judgment sought to be cancelled. A general demurrer to the amended complaint was sustained, and, plaintiffs failing to further amend, judgment was rendered for defendants. Plaintiffs appeal. The demurrer was properly sustained. In the complaint no facts are averred showing any diligence on the part of appellants."

Crim vs. Handley, 94 U. S. 652; 24 L. Ed. 216:

"Courts of equity will not enjoin judgments at law, unless the complainant has an equitable defense to the cause of action, of which he could not avail himself at law because it did not amount to a legal defense; or where he had a good defense at law, of which he was prevented from availing himself by fraud or accident, unmixed with negligence of himself or his agents. Hendrickson vs. Hinckley, 17 How., 443 (58 U. S. XV., 123)."

Brown vs. County of Buena Vista, 95 U. S., 157; 24 L. Ed. 422;

Graham vs. B. H. & E. R. R. 118 U. S. 161; 30 L. Ed. 196;

McQuiddy vs. Ware, 20 Wall 14; 22 L. Ed. 311.

Cragin vs. Lovell, 109 U. S. 194; 27 L. Ed. 903:

"It is quite clear that the bill in equity was rightly dismissed, because it contains no allegation that Cragin did not know, before the judgment against him in the suit at law, that the plaintiff in that suit alleged that he was a citizen of Louisiana. If he did then know it, he should have appeared

and pleaded in abatement; and equity will not relieve him from the consequence of his own negligence.

Phillips vs. Negley, 117 U. S. 665; 29 L. Ed. 1013.

Knox Co. vs. Harshman, 133 U. S. 152; 33 L. Ed. 586:

"A court of equity does not interefere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself and agents.

"Equity will refuse to relieve a party against a judgment which results from his own negligence or carelessness in failing to plead or defend the original action, or otherwise to watch over, protect and assert his rights in that proceeding."

23 Cyc. 980.

Appellant places considerable reliance upon the case of London & San F. Bank vs. Dexter H. & Co., 126 Fed. 593. The court will note that there is no similarity between this case and the case at bar, either as to the facts or character of proceeding. We are unable to find in that case the slightest intimation by this court of any retraction by this court of the stringent requirements where a party seeks to envoke equitable jurisdiction to set aside the due process of a court of law.

Appellant urges in its brief that there has been no change in the condition of affairs, yet its complaint al-

leges a great depreciation in the value of the property. (Trans. p. 17 and 18).

VII.

MERITORIOUS DEFENSE.

"A court of equity will not interfere with the enforcement of a judgment recovered at law unless it is unjust and unconscionable; and therefore such relief will not be granted unless the complainant shows that he has a good and meritorious defense to the original action."

23 Cyc. 1031.

"The bill must also allege and show that the complainant has a good and meritorious defense to the action at law, and it must allege and show this, not merely in general terms but by stating the facts constituting the proposed defense."

23 Cyc. 1039.

In the case at bar the bill fails to state any defense to the original action at law. No facts constituting the proposed defense are set up in the bill, nor is there even a general statement that any defense exists. On the contrary, the bill affirmatively shows that the cause of action upon which the former judgment is based, is certain notes. (Trans. p. 13). No suggestion is made in the bill that the notes were not given for money actually advanced; or that the amount recovered under the judgment in the law action was one cent in excess of the amount actually due appellee at the time the judgment was rendered. On the other

hand, the bill affirmatively alleges that appellee was a "large creditor" (Trans. p. 11) of the defendant Company, and that one hundred thousand dollars was expended upon the premises of the defendant Company "most of which was advanced" by said appellee. (Trans. p. 12). There is not an intimation that this indebtedness had been paid, or that the same was not actually due and owing at the date of the judgment at law.

In view of these facts, the remedy appellant seeks in this case, is certainly of a character calling for an extraordinary exercise of equitable jurisdiction, to say the least. The highest courts of this country express the greatest reluctance in disturbing a judgment at law, and have laid down the rule that such procedure by a court in equity will never be followed, where a good and meritorious defense to the original action fails to appear.

White vs. Crow, 110 U. S. 183; 28 L. Ed. 113:

> "John B. Henslee was the authorized agent of the Company under the laws of Colorado, upon whom service of proceedings against the company could be made; and he was also a large stockholder therein and attended without compensation, to some of the business of the company.
>
> "The company became embarrassed and suits were brought against it by its creditors in January, 1882. It owed Henslee $1,500 for money advanced to it by him. Henslee assigned his claim to the defendant Joseph R. Crow, in part payment

of money due from him to Crow, who brought suit on the claim in the County Court of Lake County, Colorado. The summons was served on Henslee, as state agent, on January 9, 1882, and four days thereafter he appeared in open Court, and, as the record of that case states, as general agent of the company, consented to the submission of the case, and judgment was thereupon rendered against the company in favor of Crow. * * * * * * * * * * While the events above mentioned in reference to this property were happening in Colorado the Supreme Court of the City and County of New York, in a suit therein pending against the company on May 29th, 1882, appointed a receiver, to whom, on October 23, 1882, the company, by order of the Court, conveyed all its property. At a sale made by the receiver about December 1, 1882, the appellant, John E. White became the purchaser of the property of the company in Chaffee County, Colorado, and on December 5th received a deed therefor from the receiver, and on December 6th a deed from the company. At the time of his purchase White knew of the liens against and sales of the property, and that the time for redemption was about to expire. * * * * * * After the time had expired, White offered to redeem from the Crow sale, but the appellees refused to allow the property to be redeemed.

"Thereupon on February 12, 1883, the appellant John E. White, filed the bill in this case to which Hanslee, Crow and the above mentioned purchasers of said judgments, and Robert Ray, the Sheriff of Chaffee County, were made parties. The Bill prayed that Ray, the Sheriff of Chaffee County, might be enjoined from making a deed to the own-

ers of the certificate of sale issued to Joseph R. Crow and that the certificate might be declared null and void and that, upon payment by the complainant, of the amounts found due to Crow on his claim against the property, he might be compelled to execute a deed of release to him for said property.

"The first assignment of error which we shall notice is, that the circuit court erred in not declaring the judgment, recovered by Joseph R. Crow against the Brittenstine Silver Mining Company void; first, because fraudulently obtained; and second, because the court was without jurisdiction to render it.

"We have been unable to find in the record any support for the contention that the judgment was fraudulently obtained. All the alleged facts set out in the bill on which the charge of fraud is based are clearly disproved by the testimony. But if the Brittenstine Silver Mining Company were itself assailing the judgment as fraudulently procured, it could not have enjoined in equity unless it could aver and prove that it had a good defense upon the merits. Hair vs. Lowe, 19 Ala. 224; Pearce vs. Olney, 20 Conn 544; Ableman vs. Roth, 12 Wis. (81) 90. There is no pretense that the Company had any defense. It has never complained of the judgment. On the contrary, it promised to pay it provided execution were stayed, and upon its promise of payment execution was stayed. Much less, therefore, does it lie in the mouth of appellant to complain of fraud in the obtaining of the judgment. On this point he has no standing in Court."

The court will note that in the case above quoted,

the contention is between a senior and junior lienor, the same as it is in the case at bar. But, in the case quoted, the agent for the defendant company went into Court four days after service of process and consented to a judgment against the company, based upon his *own claim.* Yet the Supreme Court of the United States holds that inasmuch as the claim was a valid claim, to which there was no meritorious defense, equity would refuse to set aside the judgment at law.

Newman vs. Taylor (Miss) 13 So. 831:

"The appellee against whom a judgment at law had been rendered without notice, could have secured relief by motion in the law court, upon the trial of which it would only have devolved on him to show that no service of process had been made on him. Meyer vs. Whitehead, 62 Miss. 387. Instead of resorting to the court of law, he has applied to chancery for relief, and, being in a court of equity finds himself subjected to the operation of the equitable maxim that 'he who seeks equity must do equity,' by reason of which it was incumbent upon him to show, not only that the judgment at law was void, but that he has a good defense to the suit."

Janes vs. Howell, (Neb.) 55 N. W. 965:

Chicago & B. Ry. vs. Manning, (Neb) 37 N. W. 462;

Mulvaney vs. Lovejoy, (Kan) 15 Pac. 181;

Hollinger vs. Reeme, (Ind) 24 L. R. A. 46:

"Besides, he was negligent in not bringing the action for relief after the discovery of the judg-

ment until nearly a year after its rendition. It is always necessary, when one seeks to set aside a judgment procured by fraud, to show that there is a meritorious defense to the action in which the judgment was rendered."

Dorwart vs. Troyer (Neb) 96 N. W. 116:

"It seems to be the settled law of this state that equity will not relieve against a judgment at law unless the complainant both pleads and proves a defense thereto upon the merits, nor in any case in which he has had knowledge or notice of the pendency of the action in time to make his defense therein, and has negligently omitted so to do."

Woodward vs. Pike (Neb) 62 N. W. 230;

Wilson vs. Shipman (Neb) 52 N. W. 577;

Wilkins vs. Rewey (Wis) 18 N. W. 513;

Moore vs. Hill (Ark) 8 S. W. 401;

McBride vs. Wakefield, 78 N. W. 713.

Hendrickson vs. Hinckley, 58 U. S. 443; 15 L. Ed. 123:

"The object of the Bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant, and one Campbell, since deceased.

"A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

Becker vs. Huthsteiner (Ind) 41 N. W. 323:

"Conceeding, without deciding, that the allegations in the complaint sufficiently sustain appellant in this action in her failure to appear to the action in question, upon the ground of excusable neglect, this alone, however, is not sufficient to entitle her to the relief sought by her complaint. She was also required, under the rule firmly settled by repeated decisions of this court, to further show by her pleading that she had a specific, pertinent, and good defense thereto."

Opie vs. Clancy, (R. I.) 60 Atl. 635;

Roberts vs. Moore, (Ga.) 38 S. E. 402;

Petelka vs. Fitle, 51 N. W. 131.

Eldred vs. White (Cal) 36 Pac. 944:

"It is not enough to aver that plaintiff stated the facts of the former case to certain attorneys, and was by them advised that he has a good defense, without averring that he has such a defense, and setting out the facts constituting it."

Meinert vs. Harder (Ore) 65 Pac. 1056:

"The plaintiff having failed to allege a meritorious defense, or "that his plight is in no wise attributable to his own neglect,." the decree is reversed and remanded for such further proceedings as may be necessary and proper, not inconsistent with this opinion."

Rotan vs. Springer (Ark) 12 S. W. 156:

"The plaintiffs offerred no suggestion of a defense to the claim upon which the judgment which they sought to enjoin was based. Their complaint, therefore, stated no cause of action, (State vs. Hill, 50 Ark. 458, 8 S. W. Rep. 401) and

the court did not err in sustaining the demurrer. Affirm."

Hayes vs. U. S. P. Co., (N. J.) 55 Atl. 84:

Brick vs. Burr (N. J.) 19 Atl. 842:

Osborne vs. Gehr, 46 N. W. 84:

Black on Judgments, Sec. 365; 366:

Black on Judgments, Sec. 368:

"And further, in order to obtain equitable relief against a judgment on the ground of fraud, it is necessary to be alleged and shown that there is a good defense on the merits. Or, as otherwise stated, it must be made clearly to appear that the judgment has no other foundation than the fraud charged, and that if there had been no fraud there would have been no judgment."

Black on Judgments, Sec. 378:

Fickes vs. Vick, 69 N. W. 951:

Turning back to the allegations of the Bill, wherein is any Equity whatever disclosed?

The first suggestion of any fraud contained in the Bill is in paragraph four (Trans. p. 5) wherein the complaint alleges that the judgment was obtained against the company by default; that summons was served upon L. S. McLure as President of the Company, and that said L. S. McLure made no defense to the original action. The bill, however, utterly fails to show that there was any defense which said L. S. McLure could have interposed. Moreover, we desire to call the Court's attention to the fact that the appellant

herein very carefully refrains from stating in what manner appellant's judgment was obtained, and even fails to state the date when its judgment was rendered. The reason why the complaint fails to disclose the date and manner in which appellant obtained judgment against the defendant company is, of course, apparent. If the appellant in this suit should disclose the fact upon the face of its bill, that its judgment also was secured by default it would necessarily weaken its allegation that our judgment was fraudulent because said L. S. McLure allowed the same to be taken by default. A party seeking to invoke equitable jurisdiction to the extraordinary extent which is demanded in this suit, should be held to the strictest of good faith, and evasions in its own bill should be viewed by a Court of Equity in applications of this kind with grave suspicion. Evasions are always odius to equity, and especially so where the pleader very carefully refrains from disclosing whether or not the identical situation which he alleges to be fraudulent as against the defendant, exists in his own case. We merely call attention to this feature for the purpose of questioning that degree of good faith which a litigant must disclose in seeking to invoke the jurisdiction which is sought in this case, and not because we feel that there is any merit whatever in the allegation concerning the entry of the judgment by default. The Court cannot presume that because a judgment is entered by default that such judg-

ment is fraudulent. The bill cannot merely allege that the default judgment was fraudulent. There is no fact alleged in the bill from which this Court could conclude that a single cent covered by that judgment was not due and owing for moneys actually advanced. The appellant does not even pretend to allege that every cent covered by the judgment was not loaned to the defendant company, but on the contrary, the Bill does show that appellee had advanced a large sum of money to the defendant company. (Trans. p. 12.)

The second purported fraud which the Bill alleges is that appellee McLure promised to consolidate the Broadwater Group of Mines with the mines of the Diamond R. Mining Company, and failed to do so. (Trans. p. 13). If any valid contract of this character exists the Court will readily see that there is no grounds of bringing the same into this suit. The Courts are open to the parties to compel a specific performance of that contract, (if any such contract exists.) There is not the slightest necessity of setting aside a judgment at law rendered over five years ago for money which appellee loaned to the Diamond R. Mining Company, upon any such grounds as this. Moreover, the complaint fails to show what the nature of this alleged promise was; whether appellee promised to make the Diamond R. Mining Company a present of the Broadwater group of mines; whether there were any conditions precedent which the Diamond R. Min-

ing Company was to perform, or in fact anything at all in relation to this matter. The bill alleges the legal conclusion that the consideration for the notes upon which this appellee's judgment was based, failed because appellee did not convey to the Diamond R. Company the Broadwater Group of Mines, and yet the Bill affirmatively shows that appellee advanced the cash for which said notes were given, to the Diamond R. Company, and there is not a suggestion that he did not, in fact, advance and loan to the company every dollar for which he obtained judgment.

The next allegation of the Bill is that through the fraud and conspiracy of appellee and L. S. McLure, that appellee McLure made a contract with the Diamond R. Company to treat the ores of the Broadwater Mines at 75c per ton which was at a loss to the Diamond R. Company. (Tras. p. 13). If this allegation is true, there is no reason why an action cannot be maintained to rectify this matter. The only possible effect it could have in any of the matters now under consideration is that it could possibly have been set up as a counter-claim in the original action. But there is no showing upon the face of the Bill upon which this Court can base any conclusion whatever. The Bill fails to show whether there was one ton or a thousand tons run through this concentrator, or whether the Diamond R. Company suffered a loss of one dollar or a thousand. This Court cannot set aside a judgment

at law upon the bare allegation that the company has suffered a loss because of some entirely independent contract, and especially where no intimation is given as to what this loss might have been. This matter is, however, entirely foreign and independent of the judgment at law which was rendered, and the courts are open to the parties to litigate any claims based upon this ore treatment contract, and it certainly constitutes no foundation for the exercise of the extraordinary equitable jurisdiction which is here invoked.

The next allegation is that Charles D. McLure and L. S. McLure acting in collusion and for the purpose of cheating and defrauding the appellant and other creditors, closed down the Diamond R. Mines and concentrator. (Trans. p. 13-14.) The only fact which is alleged is that Charles D. McLure and L. S. McLure closed down the Mines and concentrator. Unless that fact is itself a fraudulent act, then there is no fraud whatever alleged in that connection. Appellant cannot merely place an adverb qualifying a certain act, and thereby make that act, which is not fraudulent in itself, fraudulent; but, it must show what there was connected with this action which made it fraudulent. The manner in which appellee defrauded anyone by closing the mines does not appear. This matter, however, is subject to the same objection in this suit as the preceding allegation. It is entirely separate and independent of the judgment at law, which is sought to be

set aside. The fraud upon which a Court of equity takes jurisdiction and revokes a judgment at law is a fraud directly affecting the judgment itself. These collateral, separate and independent matters which this Bill sets up cannot be considered by this Court in a suit of the character now before it. In a suit in equity to set aside a judgment at law the various rights and equities of the parties cannot be litigated, but the Court is confined specifically to the judgment which is attached, and it is only when clearly disclosed that the judgment itself was fraudulent; a good and meritorious defense thereto existed; that the defendant was prevented from presenting that defense by reason of the fraud of the plaintiff in such action; and the complainant party shows that he has been guilty of no neglect, that a court of equity will even consider disturbing the solemn judgment of a court at law. Collateral matters and other and independent equities cannot be submitted to a court of equity for the purpose of invoking its jurisdiction to set aside the adjudication of a Court at law.

The same objection exists as to the allegation concerning the redemption by appellee from the Bartlett judgment. (Trans. p. 14.) Moreover, this redemption, as disclosed by the complaint, was made on the 23rd day of March, 1905, long subsequent to the judgment which appellant seeks to have declared void. We may also suggest that it is a startling proposition that a

party can be charged with fraud and collusion for redeeming a prior lien in absolute accordance with the Statutes of this State, in order to protect his own lien upon the same property. We exercised our right under the Statutes to redeem from the prior lien, and the appellant itself shows that the statutes gave it the same right to redeem had it seen fit to do so. The appellant contends that appellee, holding a judgment against the company for some ninety thousand dollars, should have redeemed from this prior lien in the name of the company in order that the appellant, holding a lien subsequent to ours, could secure the benefit of our disbursement. Their demands are modest to say the least, but in view of the fact that this entire matter is long subsequent to the judgment which this Bill seeks to have declared void, we deem it hardly necessary to further discuss this allegation of the bill. We cannot resist remarking upon the statement in the bill, however, wherein appellant alleges a grievance by reason of the fact that Section 1236 of the Code of Civil Procedure of the State of Montana would compel the appellant in making a redemption to pay appellee's claim. It is not exactly clear to us whether or not the purpose of this allegation is to secure from this Court an amendment of this Section of the Codes of Montana, or whether the allegation is made for the purpose of disclosing the fraudulent conduct on the part of appellee in exercising the right which the laws of this

State grant unto him.

A long line of authorities have been cited to this Court clearly establishing the principles upon which a court of equity will act in matters of this kind, but the two cases which are absolutely conclusive of the questions here presented, and to which we desire to call the particular attention of this Honorable Court, is the case of Denton vs. Baker, decided by this court found in the 93 Federal Rep. at page 46; and the case of White vs. Crow, 110 U. S. 183.

Not only does the bill of complaint in this case fail to state facts sufficient to justify a Court of equity in setting aside a judgment of a Court at Law, rendered over five years ago, but even if the suit was original, and no judgment at law existed, we contend that this Court could not find from the allegations of this Bill that appellee would not now be entitled to receive the money which the Bill of complaint shows that he loaned to the Diamond R. company. The complaint alleges various collateral matters, which the pleader designates to have been fraudulent, but the complaint also affirmativey shows that appellee actually advanced the cash upon which his claim was based, and none of these collateral matters, alleged in the complaint, are specific either as to the amount or as to the facts upon which they are based; and thus we contend that the complaint is even insufficient to enable this Court to say that appellee would not be entitled to

preceed and secure a judgment for the moneys which the complaint shows to be due him, let alone exercise the extreme power of setting aside a judgment upon that claim rendered over five years ago by a Court at Law and of competent jurisdiction.

We respectfully submit that appellant's bill fails to disclose any equity; that the demurrer was properly sustained, and the judgment of the court below should be affirmed.

Respectfully submitted,

IRA T. WIGHT,

Solicitor and Counsel for Appellees.